IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In Re Enron Corporation Securities, Derivative & "ERISA" Litigation	§	MDL-1446
This Document Relates To: H-01-3624 and H-03-CV-2240	§	
MARK NEWBY, ET AL., Plaintiffs VS. ENRON CORPORATION, ET AL., Defendants	§	CIVIL ACTION NO. H-01-3624 CONSOLIDATED CASES
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, VS. KENNETH L. LAY, et al., Defendants.	§	
CONSECO ANNUITY ASSURANCE CO., Individually and on Behalf of All Others Similarly Situated, Plaintiffs, VS. CITIGROUP, INC., CITIBANK,N.A., CITICORP, SALOMON SMITH BARNEY, SALOMON BROTHERS INTERNATIONAL LIMITED, RICK CAPLAN, JAMES REILLY, WILLIAM J. FOX, and MAUREEN HENDRICKS, Defendants.	§	CIVIL ACTION NO. H-03-2240

MEMORANDUM AND ORDER

Pending before the Court in *Newby, et al., Individually and On Behalf of All Others Similarly Situated, v. Enron Corporation, et al.*, H-01-3624 are Conseco Annuity Assurance Company's ("Conseco's") (1) cross motion for leave to give notice to the purchasers of Yosemite II, Sterling and Euro Citigroup CLNs (instrument #2173) and (2) motion for reconsideration of the Court's June 1, 2004 order granting the Regents of the University of California leave to give notice to certain class members pursuant to Rule 23(d)(2)(instrument #2184). As an initial matter in light of the Court's order granting the Regents leave to give notice on June 1, 2004, and the subsequent effectuation of that order, the Court finds that both of these motions are moot.[1] In reviewing Conseco's pending motion in *Conseco Annuity Assurance Co., Individually and On Behalf of All Others Similarly Situated, v. Citigroup, Inc., et al.*, H-03-2240, the Court will address two questions raised earlier in the *Newby* motions, i.e., whether Conseco has or should have an exclusive or concurrent ability (with *Newby* Lead Plaintiff) to represent a proposed class of purchasers of Yosemite II, Sterling, and Euro Citigroup Credit Linked Notes and whether the Regents of the University of

[1] In its motion for expedited consideration of its motion for reconsideration (#2185 at 2, in *Newby)*, which has been terminated, Conseco conceded that its motion for reconsideration would be moot if the Court did not prevent distribution of the class notice before June 15, 2004.

California's has standing to do so and has timely filed such claims.[2]

Pending before the Court and relating to putative class action H-03-2240, brought on behalf of Plaintiff Conseco and all others who purchased credit linked notes that were issued by Citigroup, Inc. or its subsidiaries or affiliates and which listed Enron Corporation ("Enron") as the credit reference entity, during a class period from November 4, 1999 through December 3, 2001,[3] is

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[2] In its *Newby* cross motion (#2173) Conseco raised a limitations bar to the Regents' claims based on Yosemite I Citigroup CLNs.

In an April 1, 2004 order (#2048) this Court held that the one-year/three-year period of limitations/repose established in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991) applied. It also found that the First Amended Consolidated Complaint, filed on May 14, 2003, which added various bank subsidiaries and claims against them, did not "relate back" to the First Consolidated Complaint, filed on April 8, 2002. #2036 at 53-75. Nevertheless, as explained in that order, *id.*, it found good cause to construe a letter dated January 14, 2003 from Lead Plaintiff's counsel as a motion for leave to amend to add those subsidiaries. Therefore, for purposes of determining whether the Regents' claims against certain subsidiary bank Defendants were timely, it deemed the First Amended Consolidated Complaint as filed on January 14, 2003. #2036 at 66-74. It also found that Lead Plaintiff timely asserted the 1933 Act claims within the one-year statute of limitations because the earliest potential storm warnings to trigger notice inquiry for the Foreign Debt Securities Offerings was in the fall of 2002, and therefore the First Amended Complaint, deemed filed on January 14, 2003, was within one year of notice inquiry.

[3] In its memorandum of law (#8 at 2 n.3, Conseco states that the Citigroup CLNs are comprised of the following securities:

> (a) Yosemite Securities Trust I 8.25% Series 1999-A Linked Enron Obligations maturing November 15, 2003, issued in the aggregate amount of $750,000,000 on or about November 4, 1999; (b) Yosemite Securities Trust II 8.75% Series 2000 Linked Enron Obligations maturing February 2007, issued in the aggregate amount of [200,000,000 English pounds] on or about

Conseco's re-filed motion for appointment of itself as Lead Plaintiff and approval of its choice of Abbey Gardy, LLP, and Shapiro Haber & Urmy, LLP, as Co-Lead Counsel, and of Puls, Taylor & Woodson, LLP as Liaison Counsel (#7 in H-03-2240), pursuant to Section 21D(a)(3)(B) of the Securities Exchange Act of 1934, and Section 27(a) of the Securities Act of 1933, as amended by the Private Securities Litigation Reform Act of 1995 ("PSLRA"). The motion is supported by a declaration from Brant C. Martin of Puls, Taylor & Woodson, LLP, with exhibits that include its published notice to the class, its November 27, 2002 certification of Conseco's willingness to serve as a representative party on behalf of the Citigroup CLN class, and resumes of the law firms which reflect their competence for representation in this class action.

> February 23, 2000; (c) Credit Linked Notes Trust 8% Notes maturing August 15, 2005, issued in the aggregate amount of [500,000,000 English pounds] on or about August 25, 2000; (d) Credit Linked Notes Trust II 7 3/8 % Notes maturing May 15, 2006, issued in the aggregate amount of $500,000,000 on or about May 24, 2001; (e) Enron Sterling Credit Linked Notes Trust 7 1/4% Notes maturing May 24, 2006, issued in the aggregate amount of [125,000,000 English pounds] on or about May 24, 2001; and (f) Enron Euro Credit Linked Notes Trust 6 1/2% Notes maturing May 24, 2006, issued in the aggregate amount of 200,000,000 Euros on or about May 24, 2001.
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> Together the Yosemite I Notes, the Yosemite II Notes, the Yosemite III Notes, the ECLN Notes, the ECLN II Notes, Sterling CLN Notes and the Euro CLN may be collectively referred to herein as "Citigroup CLNs."

It is undisputed that Conseco, itself, purchased only three types of the Citigroup CLNs, i.e., Yosemite Securities Trust I, Credit Linked Notes Trust and Credit Linked Notes Trust II.

This action alleges that Conseco purchased Citigroup CLNs at inflated prices and incurred damages of $6.4 million because of Citigroup's wrongdoing. Conseco charges that "Citigroup issued and sold the Citigroup CLNs in order to fraudulently transfer $2.4 billion of its Enron credit risk exposure from itself to third party investors such as [Conseco] and the Citigroup CLN Class, who did not know that Enron's financial statements had been manipulated." #8 at 3.

An institutional investor, Conseco claims it should be appointed Lead Plaintiff because it is the only party appearing in H-03-2240 that has met the requirements of the PSLRA for reasons discussed below. Conseco also insists that its claims are typical of those of other class members because it purchased Citigroup CLNs during the class period at artificially inflated prices as a result of Defendants' fraudulent scheme and suffered damages as a consequence. Conseco further maintains that it will adequately represent the interests of the class because its actions since the start of the litigation, which it describes, reflect its active efforts to represent the class, which will continue, and because its chosen counsel are competent and zealous. Conseco's motion for appointment is opposed by *Newby* Lead Plaintiff, the Regents of the University of California.

Procedural History

Hudson Soft Company, on July 22, 2002,[4] filed a class action suit grounded in the Racketeer Influenced and Corrupt Organizations Act (" RICO"), 18 U.S.C. §§ 1961, *et seq.*, against Credit Suisse First Boston Corporation, Credit Suisse First Boston International, CSFB Europe Ltd., Donaldson, Lufkin & Jenrette Securities Corporation, Citibank N.A., Salomon Smith Barney, Inc., Schroder Salomon Smith Barney, Salomon Brothers International Ltd., Arthur Andersen L.L.P., Vinson & Elkins L.L.P., and a number of bank employees and Enron Corporation officials in the Southern District of New York. In an amended complaint, filed on September 29, 2002, Hudson Soft added, as alternative causes of action, securities fraud claims under § 10(b); that same day it timely published notice on the *PR Newswire* as required by the PSLRA, 15 U.S.C. § 78u-4(a)(3)(A)(i). Subsequently on October 30, 2002, it filed a motion for appointment as Lead Plaintiff. 15 U.S.C. § 78u-4(a)(3)((A) and (B)(any person or group of persons who are members of proposed class may apply within sixty days after publication of the notice, to the Court to be appointed Lead Plaintiff, whether or not they have filed a complaint in the action).

[4] The first *Newby* class action suit was filed on October 22, 2001, and the Regents of the University of California was appointed Lead Plaintiff on February 15, 2002.

On November 27, 2002, Hudson Soft and Conseco timely[5] and jointly filed a superseding motion to be appointed [Co-]Lead Plaintiffs, with Hudson Soft to represent purchasers of Credit Suisse First Boston CLNs and Conseco to represent purchasers of the Citigroup Credit Linked Notes ("CLNs"). That motion was unopposed. Hudson Soft then began voluntarily dismissing a number of the defendants named in its original and first amended complaint, leaving only Credit Suisse First Boston entities and Citigroup entities in the suit. On February 28, 2003, Hudson Soft and Conseco moved to sever the claims based on CSFB's Enron-linked notes from claims based on the Citigroup CLNS, with Hudson Soft indicating that it was no longer pursuing class claims but only individual claims and was withdrawing from seeking lead plaintiff status. The severance would permit Conseco to prosecute its individual and class claims against the Citigroup entities.

On March 5, 2003, Conseco filed a separate class action complaint in the Southern District of New York against Citigroup and its subsidiaries and employees for violations of § 10(b), §

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[5] The time for Citigroup CLN Class members to file motions for appointment of Lead Plaintiff and approval of Lead Counsel expired on November 28, 2002. Conseco relies on both the September 29, 2002 notice published by Hudson Soft in *PR Newswire* and the joint motion for appointment filed in H-03-860 to fulfill requirements under the PSLRA for H-03-2240. Conseco argues that because it was the only party to file a timely motion for appointment as Lead Plaintiff in H-03-2240 (actually in predecessor H-03-860), it necessarily has the largest financial interest in the relief sought by the class and should be designated Lead Plaintiff since it has met all other requirements. 15 U.S.C. § 78u-4(a)(3)(B).

20A, and 20(a) of the 1934 Act and § 12(a) and § 15 of the 1933 Act.

Both cases were transferred to this Court in March 2003 by the Judicial Panel for Multidistrict Litigation for inclusion in MDL 1446. Hudson Soft's suit was designated as H-03-860, while Conseco's class action against Citigroup entities and employees was designated as H-03-2240, currently before the Court. This Court consolidated the two cases with *Newby* for pretrial matters and ruled that the joint motion for appointment of Lead Plaintiffs and Lead Counsel was moot because the claims were encompassed by the *Newby* Consolidated Complaint and covered by *Newby's* appointed Lead Plaintiff and Lead Counsel. This Court also granted the motion to sever in H-03-860. Conseco then filed a motion to reconsider the mooting of the motion for appointment of Lead Plaintiff as to Conseco because Conseco maintained that its claims based on Citigroup-issued CLNS were not covered by *Newby*. The Court reinstated that motion on November 18, 2003 and granted leave to any party or any putative class member to file opposition within twenty days in H-03-860. The order was not posted in *Newby* or MDL 1446, and *Newby* Lead Plaintiff objects that it had no knowledge of it and therefore did not file timely opposition; indeed no opposition was filed to the motion. The parties subsequently filed a stipulation and order dismissing H-03-860 pursuant to a Settlement and Release Agreement. Conseco's suit, H-03-2240, remains pending. Under the circumstances, the Court granted leave to Conseco to re-file the previously unopposed

motion for appointment of Lead Plaintiff and Lead Counsel in H-03-860 in Conseco's separate class action, H-03-2240. Conseco did so but, again did not file or serve the motion on counsel in the *Newby* case nor in MDL 1446.

Opposition to the Motion

Newby Lead Plaintiff has filed opposition to Conseco's motion for appointment in H-03-2240. With respect to the late filing of its opposition, Lead Plaintiff emphasizes that Conseco never served its attorney nor counsel for any parties in *Newby* with a copy of the first or the re-filed motions for appointment of Lead Plaintiff and Lead Counsel, nor were Court orders regarding the motions and the issues docketed in *Newby* or MDL 1446, so that Lead Plaintiff had no notice of the matter. In view of the situation, the Court finds that Lead Plaintiff's opposition was timely filed and considers it in resolving the motion.

The Court has previously made some rulings relevant here. First, there is a distinction between a statutory Lead Plaintiff under the PSLRA,[6] i.e., the person or group of persons

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[6] 15 U.S.C. § 78u4(a)(3)(B)(iii)(I)("The Court shall adopt a presumption that the most adequate [lead] plaintiff in any private action arising under this chapter is the person or group of persons that . . . in the determination of the court, has the largest financial interest in the relief sought by the class; and otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure."). The presumption "may be rebutted only upon proof . . . that the presumptively most adequate plaintiff" fails to satisfy the adequacy or typicality requirements of Rule 23. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II). For a discussion of these see #1999 at 75-77. Because only two of the prerequisites under Rule 23(a) refer to the Lead Plaintiff, i.e., adequacy and typicality, the Court does not address the other requirements until the time for class certification. *In re Waste Management, Inc. Sec. Litig.*, 128 F. Supp. 2d 401, 411 (S.D. Tex. 2000).

selected from those applying for the role based on having the largest financial interest in the relief sought by the class and the ability to satisfy the requirements of Fed. R. Civ. P. 23, and a named plaintiff with standing to sue a defendant on behalf of a putative class. As recently summarized by the Second Circuit Court of Appeals,

> Nothing in the PSLRA indicates that district courts must choose a lead plaintiff with standing to sue on every available cause of action. Rather, because the PSLRA mandates that courts must choose a party who has, among other things, the largest financial stake in the outcome of the case, it is inevitable that, in some cases, the lead plaintiff will not have standing to sue on every claim. *See In re Initial Pub. Offering Sec. Litig.*, 214 F.R.D. 117, 123 (S.D.N.Y. 2002)("[T]he fact that the lead plaintiff is to be selected in accordance with objective criteria that have nothing to do with the nature of the claims . . . strongly suggests the need for named plaintiffs in addition to any lead plaintiff.") In those cases, just as a class representative can establish the requisite typicality under Rule 23 if the defendants "committed the same wrongful acts in the same manner against all members of the class . . . so too can lead plaintiffs.

Hevesi v. Citigroup, Inc.. 366 F.3d 70, 82-83 (2d Cir. 2004). The panel further pointed out,

> Also, considering the role of the lead plaintiff is "to empower investors so that they--not their lawyers--exercise primary control over private securities litigation," . . . any requirement that a different lead plaintiff be appointed to bring every single available claim would contravene the main purpose of having a lead plaintiff--namely, to empower one or several investors with a major stake in the litigation to exercise control over the litigation as a whole. *See In re Initial Pub. Offering Sec. Litig.*, 214 F.R.D. at 123 ("The only other possibility--that the

> court should cobble together a lead plaintiff group that has standing to sue on all possible cause of action--has been rejected repeatedly by courts in this Circuit and undermines the purpose of the PSLRA.") . . . .

Id. at 83 n.13. The PSLRA does not bar the addition of named plaintiffs or class representatives that meet the requirements of Rule 23, but who themselves do not qualify to serve as a lead plaintiff, to help Lead Plaintiff to represent a class. *Id.* at 83. *See* #1999 at 10-12, 65-66. The Fifth Circuit has determined that the PSLRA heightened the adequacy standard for a Lead Plaintiff above that for class representative under Rule 23 in indicating that Congress "enacted the 'lead plaintiff' provisions . . . to direct courts to appoint, as lead plaintiff, the most sophisticated investor available and willing so to serve in a putative securities class action. . . ." *Berger v. Compaq Computer Corp.*, 279 F.3d 313, 313 (5th Cir. 2002).

Furthermore, the nature of the claim can determine who has standing to assert it. In earlier rulings, e.g., #1999, this Court has noted that for standing to sue under § 12(a)(2), a plaintiff investor must have purchased the particular security at issue and must be in privity with the defendant who must be the plaintiff's immediate "seller," within the meaning of the statute, a limitation on imposition of liability. #1999 at 89, 90-96. In contrast for claims under § 10(b), privity is not required. *Id.* at 90-97; # 2050 at 4. Moreover where Lead Plaintiff alleges a course of conduct or illegal scheme in violation of § 10(b), "the class representative may have purchased different types of

securities than those in the class." *Id.* at 95, 4, respectively.

Lead Plaintiff complains that Conseco's motion is "the latest of its efforts to splinter the *Newby* class action . . . into multiple actions and appoint itself a ***second*** lead plaintiff." #13 at 1. Emphasizing that Conseco filed its "satellite" class action long after the Regents had been appointed Lead Plaintiff in *Newby* on February 15, 2002, Lead Plaintiff explains that Conseco's Citigroup CLNs are a subset of what *Newby* has characterized as "Foreign Debt Securities,"[7] which *Newby* Lead Plaintiff is authorized by this Court under the PSLRA to prosecute along with other claims of other Enron securities' purchasers. Moreover, Conseco failed to serve a copy of its motion for appointment on previously appointed *Newby* Lead Plaintiff.

In light of the Court's appointment of the Regents as Lead Plaintiff to pursue the same claims that Conseco seeks to bring here, and of the Court's February 25, 2004 order authorizing the intervention of ICERS in *Newby* (#1999)[8] to pursue as a named

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[7] Conseco disagrees and insists the Citigroup CLNs are not "Foreign Debt Securities" because they were

> issued and sold by Citigroup and were not issued or sold, directly or indirectly, by Enron or any Enron Special Purpose Entity. In contrast, the Marlin Water Trust II Notes, purchased by the Imperial County Employees Retirement Systems ("ICERS") were issued and sold by an Enron Special Purpose Entity known as the Marlin Water Trust--and were not issued or sold by Citigroup.

#15 at 12 n.18.

[8] #1999 at 65-66 distinguished the role of Lead Plaintiff under the PSLRA (plaintiff with the largest financial interest)

plaintiff a § 12(a)(2) claim based on the only kind of securities ICERS purchased, i.e., the Marlin Water Trust II,[9] the Regents insists that the only possible "class" that Conseco has standing to represent is persons bringing only § 12(a)(2) claims on behalf of the three CLNs actually purchased by Conseco, as identified in its certification (#9, Declaration of Brant C. Martin, Ex. E), specifically Yosemite Securities Trust I, Credit Linked Notes Trust and Credit Linked Notes Trust II. The Court's order made clear that "purchasers of the Foreign Debt Securities are within the controlling *Newby* complaint's definition of the alleged

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from that of named plaintiff and/or class representative and pointed out that Lead Plaintiff has standing to sue for claims based on securities it did not buy, but that a named plaintiff may only assert claims based on securities that it did purchase.

[9] Lead Plaintiff points out that in that order, which addressed Conseco's opposition to Lead Plaintiff's amended complaint adding claims based on the Foreign Debt Securities and to the intervention of ICERS to serve as a named plaintiff, the Court found "unpersuasive and spurious Conseco's tactical endeavor to distinguish [*Conseco* and *Newby*] by partitioning one part of the larger scheme asserted in *Newby* from the rest." #1999 at 16 n.16. The Court also recognized that Lead Plaintiff timely investigated and asserted the claims of the Foreign Debt Securities purchasers. #1999 at 63. Because the Court determined that there must be a class representative who purchased each type of Foreign Debt Security from each defendant to assert a § 12(a)(2) claim against such defendant, the Court granted leave to Lead Plaintiff to give notice to purchasers of Foreign Debt Securities to inform them that a class member who had purchased each type of Foreign Debt Securities from a Defendant would have to appear to act as a class representative or § 12(a)(2) claims would be dismissed at the time of class certification. #2180. The Bank Defendants voluntarily sent out the notice to the relevant purchasers and published it. #2373 AT 2.

In addition although Conseco argues that it alone filed a timely motion for appointment as Lead Plaintiff in the member action based on the Citigroup CLNs, Lead Plaintiff points out that it satisfied those requirements within the *Newby* class action long before Conseco filed a motion in H-03-380 and that Conseco chose not to file such a motion in *Newby*.

victims of the same pattern of misconduct, the same fraudulent scheme charged in Newby, even though Conseco chose to limit its independent class action claims to those against Citigroup and its subsidiaries." *Id.* at 107-08.[10] Furthermore, Lead Plaintiff argues that instead of pursing a separate duplicative class action and Lead Plaintiff status, the "proper avenue" for Conseco is to seek to become the class representative for those claims within *Newby*. #13 at 2.[11] Lead Plaintiff maintains that "all class members would be better served by a single Enron class action, with the attendant efficient use of judicial and litigant resources through one Lead Plaintiff (The Regents) executing pleading, discovery, trial and settlement of all Enron-related claims on behalf of as broad a class of investors as possible."[12] #13 at 11.

In addition, urges Lead Plaintiff, not only has this Court highlighted the practical need for a unified prosecution of

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[10] The Court observes that the same order stated, "Putative class members should have the right to determine which suit and class they will join if their claims in both actions survive and classes are certified." *Id.*

[11] In #1999 at 18-19 n.18, before determining whether Lead Plaintiff's claims based on the Yosemite I Citigroup CLNs were time-barred, this Court previously indicated to Conseco that it had several options: it could choose to participate in the *Newby* class or subclass for purchasers of CLNs or it could opt out and pursue a separate suit, either individually or in a putative class action, and move for appointment as Lead Plaintiff if it chose a separate class action. As will be discussed, the last option of an independent class action would be viable only if a class in *Newby* is not certified and/or until one is.

[12] Lead Plaintiff points out that it has sued a number of defendants not named in H-03-2240.

the Enron litigation, but "the PSLRA does not authorize appointment of a second lead plaintiff in an unjustified satellite action, after appointment of lead plaintiff in the master case." #13 at 3. Conseco has not rebutted with proof the presumption that the Regents, which was found to have the largest financial interest in the outcome of the litigation" under § 78u-4(a)(3)(B)(iii)(I), "will not fairly and adequately protect the interests of the class or that [the Regents] is subject to unique defenses that render [it] incapable of adequately representing the class." 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II). There is no other procedure to challenge the Regents' appointment as Lead Plaintiff.

Aside from arguing the impropriety of concurrent class actions asserting the same claims, the Regents also contends that Conseco fails to demonstrate the qualifications for Lead Plaintiff. Specifically it maintains that Conseco's claims are not typical of the class it seeks to represent, because it purchased only three of the CLNs on which it sues. Nor does Conseco sufficiently demonstrate adequacy, to satisfy the prerequisites of Fed. R. Civ. P. 23.

Conseco's Reply

In reply (#15), Conseco argues under the governing three-year period of repose, the Regents had to assert all their federal securities law claims on behalf of the Yosemite I Citigroup CLNs by November 4, 2002, which was three years from the issuance of those CLNs on November 4, 1999. Conseco concludes that the Regents were untimely in not asserting them until January

14, 2003 and that these investors will be prejudiced if Conseco is not appointed Lead Plaintiff in H-03-2240 because their Yosemite I federal securities claims in *Newby* will be time-barred. Furthermore, argues Conseco, the existence of this time bar defense[13] renders *Newby* Lead Plaintiff an inadequate representative, as does the defense that Lead Plaintiff lacks standing to sue under § 12(a)(2) on behalf of any purchaser of the Citigroup CLNs because it did not purchase any.

Conseco points out that IHC Health Plans, Inc. ("HPI") and Desert Mutual Bank Administrators ("DMBA"), who were sophisticated institutional purchasers of Citigroup CLNs, withdrew from seeking to intervene in *Newby* and have elected to pursue their claims exclusively in H-03-2240. #15 at 4, n.10; Declaration of IHC Health Plans Inc., Ex. F to #9[14] (Declaration of Brant C. Martin). Furthermore, on November 30, 2004 ICERS, which

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[13] Conseco maintains that it could not serve as a class representative in *Newby* for purchasers of Yosemite I Citigroup CLNs because those claims in *Newby* are absolutely time-barred and would not be revived by intervention of Conseco. Instead, abandoning H-03-2240 and joining the *Newby* class would only permanently preclude purchasers of these notes them from pursuing their claims.

[14] According to the Declaration filed by Jacque Millard, Chief Investment Officer and Authorized Representative for HPI, when HPI initially approached Milberg Weiss about being represented by that firm and participating in *Newby*, Milberg Weiss did not inform HPI about the existence of Conseco's separate action, but filed a motion to intervene in *Newby* on behalf of HPI. Subsequently, when Millard was deposed as HPI's representative, Millard learned of the Conseco suit. Milberg Weiss had informed Millard that any recovery in *Newby* would be allocated equally among all class members and sub-classes in proportion to their losses without consideration of the strength of their respective claims. HPI decided to withdraw its motion to intervene and to join in Conseco's suit, which exclusively represented the interests of investors in Citigroup CLNs.

had been designated as a representative of all purchasers of the Foreign Debt Securities by the Regents,[15] filed a notice of withdrawal (#2699 in *Newby*) as both a plaintiff and as a proposed class representative, it settled its individual claim with Deutsche Bank in *Newby*, and the Court dismissed that individual claim and ICERS on January 10, 2005 (#2934).

Moreover, Conseco points out that on June 14, 2004 the Regents issued a "Notice of Dismissal of Certain Claims," which asked class members who had standing to assert § 12(a)(2) claims on behalf of Citigroup CLN purchasers to come forward or face dismissal of these claims. No person or entity did so, and the Regents informed the court on August 31, 2004, "As no party has stepped forward at this time, [the Regents] believes it is important to inform the Court as to the results of the notice process so that the litigation can continue apace and a class can be certified." Notice To The Court Regarding Notice to Certain Class Members (#2373) at 4. Thus HPI, DMBA, and Conseco, the only three purchasers of Citigroup CLNs to come forward and continue to assert claims, seek to prosecute their claims in H-03-2240, although Conseco remains a party in *Newby*. Conseco contends that by necessity it should be appointed Lead Plaintiff in H-03-2240 so that it has the formal authority to move for class certification on behalf of purchasers of the Citigroup CLNs.

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[15] Furthermore Conseco represents that ICERS did not purchase any Citigroup CLNs. #24 at 2.

In sum, Conseco emphasizes that it is the only entity qualified and capable of representing purchasers of Citigroup CLNs during the proposed class period because (1) H-03-2240 is the only action that timely asserted federal securities claims on behalf of all Citigroup CLN purchasers; (2) Conseco is the only entity that purchased three issues of the Citigroup CLNs and therefore the only entity that has standing to assert § 12(a)(2) claims based on them; (3) it is the only entity that has standing and qualifies to represent the putative class under Fed. R. Civ. P. 23, a requirement for appointment as Lead Plaintiff under the PSLRA; and (4) Conseco is the only entity to have timely sought appointment as Lead Plaintiff in H-03-2240.

In addition, urges Conseco, Lead Plaintiff lacks standing to pursue claims on behalf of Citigroup CLN purchasers for violations of § 12(a)(2), which requires privity with the seller Citigroup, because Lead Plaintiff did not purchase any Citigroup CLNs. For the same reason Conseco insists that Lead Plaintiff does not have the largest financial interest in the outcome of H-03-2240. In contrast, Conseco is the only party before the Court that has purchased three of the six issues of Citigroup CLNs.[16] It is therefore adequate to represent the class of investors for those three under § 12(a)(2), and derivative

[16] Moreover, asserts Conseco, even if the Court finds that the Citigroup CLNs are part of the "Foreign Debt Securities" and that ICERS can serve as a class representative for the Marlin Water Trust II Notes purchasers, Lead Plaintiff does not have the largest financial interest in the outcome of the suit because ICERS claims damages of only $744,000, while Conseco incurred damages of more than $6.4 million from its purchase of the inflated Citigroup CLNs.

claims under § 15, and for purchasers of all Citigroup CLNs for claims under § 10(b), and derivative claims under § 20(a), since Conseco has alleged a common scheme to defraud.

Court's Ruling

Lead Plaintiff insists that its claims regarding Yosemite I are timely because it has asserted claims against Citigroup based on its participation in the fraudulent scheme since it filed its Consolidated Complaint on April 8, 2002. Its Amended Complaint, filed on May 14, 2003, merely added some subsidiaries of the defendant banks and added § 12(a)(2) claims against the Foreign Debt Securities, including Yosemite I. Lead Plaintiff claims that in the Court's April 1, 2004 order (#2050 at 4; also #1999 at 95 in *Newby*), the Court rejected the limitations arguments because Lead Plaintiff had pleaded a course of conduct and fraudulent scheme under § 10(b).

Lead Plaintiff has taken the Court's statement about a fraudulent scheme out of context or the Court did not make itself clear. The Court was comparing the privity requirement for class representatives for claims under § 12(a)(2) with the more relaxed requirements for claims under § 10(b); with regard to the latter, where a scheme is alleged the class representative need not have bought a particular type of security from a particular defendant to represent other investors who did. The Court did not conclude

that pleading a scheme would modify limitations requirements under *Lampf* for either § 10(b) or § 12(a)(2) claims.[17]

Moreover, in focusing on the limitations question with the Citibank CLNs at issue here, the Court concurs with Conseco that Lead Plaintiff's federal securities law claims based on the Yosemite I Citigroup CLNs, issued on November 4, 1999, in *Newby* are time-barred. *See* #2048 at 8 (for claims under § 12(a)(2) the three-year period of repose begins to run on the date of the sale of the security without allowance for equitable tolling; finding that § 10(b) and § 12(a)(2) claims against CIBC Defendants asserted on January 14, 2003 based on Enron Notes offered on May 19, 1999 were time-barred).

Furthermore Lead Plaintiff itself lacks standing to bring the timely § 12(a)(2) claims based on the other five Citigroup CLNs and has been thus far unable to find any class members willing to act as a class representatives for other potential class members who may have such claims. Conseco, which does have standing, is unwilling to do serve as a class representative in the *Newby* action, yet has shown itself qualified[18] and willing to do so in its own suit, H-03-2240, for the purchasers of the three Citigroup CLNs that Conseco purchased,

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[17] The Court knows of no doctrine in federal securities law analogous to the continuing violation theory applied in Title VII employment discrimination cases to overcome a limitations bar.

[18] Despite a lot of name-calling by both sides in the pleadings, the Court finds that Conseco is qualified to serve as a class representative.

and HPI and DMBA, also qualified, seek to prosecute their claims in that action.

As stated in the Advisory Committee Notes to Rule 23(b)(3), the class action mechanism's goals of "economies of time, effort, and expense and promot[ion of] uniformity of decision as to persons similarly situated" may also be realized in part by "arrangements for avoiding repetitious discovery and the like," such as multidistrict litigation, as has been the case with MDL 1446. Clearly there is substantial strategy afoot here to undermine Lead Plaintiff's putative class action in *Newby* and thwart the purpose of such a mechanism. This Court has delayed all but discovery in those MDL cases not formally consolidated into *Newby* until after resolution of class certification in *Newby,* in part to allow all potential class members to determine whether they wish to join the *Newby* action in order to achieve the goals of economy and uniformity of decisions, as well as to encourage settlements.

Because no class has yet been certified, there is still room for flexibility here and Conseco's challenge is premature. The *Newby* class, if certified, will be drawn to exclude claims that are time-barred and/or which no plaintiff has standing to assert.[19] If the *Newby* class is certified, the Court observes that

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[19] "'A litigant must be a member of the class which he or she seeks to represent at the time the class action is certified by the district court.'" *James v. City of Dallas, Texas*, 254 F.3d 551, 562 (5th Cir. 2001)(*quoting Sosna v. Iowa*, 419 U.S. 393, 403 (1975)), *cert. denied*, 534 U.S. 1113 (2002). "Both standing and class certification must be addressed on a claim-by-claim basis." *Id.* at 563, *citing Steel Co. v. Citizens for a Better Env't*, 523

there is nothing to prevent Conseco, along with HPI and DMBA, individually, from pursuing concurrently with a *Newby* class action any claims that may be foreclosed in *Newby* by limitations or opting out of that class for any claims *Newby* does pursue. Because "[t]he class certification determination rests within the sound discretion of the trial court" as long as that discretion "is exercised within the constraints of Rule 23," there is also no mandate that the Court must certify a class in H-03-2240.[20] *Unger v. Amedisys, Inc.*, No. 03-30965, 2005 WL 375684, *2 (5th Cir. Feb. 17, 2005).

Rule 23(b)(3)(B) permits certification *inter alia* if a class action is "superior to other available methods for the fair and efficient adjudication of the controversy." One factor to consider in this analysis is "the extent and nature of any litigation concerning the controversy already commenced by or against members of the class." Rule 23(b)(3)(B). This Court notes that a district court has the discretion to deny class certification under Rule 23(b)(3) "to avoid duplicative class actions." *Becker V. Schenley Industries, Inc.*, 557 F.2d 346, 348 (2d Cir. 1977). In *Becker*, the Second Circuit affirmed the district court's denial of class certification where plaintiffs

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U.S. 83, 105 (1998).

[20] Indeed, from the lack of response to Lead Plaintiff's notice to the class, Conseco may be unable to satisfy the numerosity requirement under Rule 23(a) for certification of a class action based on the Citigroup CLNs.

could intervene in another pending action in which related claims had been raised.

Accordingly, because Conseco's challenge to be appointed Lead Plaintiff so it can pursue a class certification on behalf of investors in Citigroup CLNs will become ripe only with resolution of Lead Plaintiff's motion for class certification and a definition of the class and because only then can any overlap or duplication in the Plaintiffs' complaints be finally appraised, for reasons stated in this memorandum the Court

ORDERS the following:

(1) Conseco's cross motion for leave to give notice to the purchasers of Yosemite II, Sterling and Euro Citigroup CLNs (#2173) and motion for reconsideration of the Court's June 1, 2004 order granting the Regents of the University of California leave to give notice to certain class members pursuant to Rule 23(d)(2) (#2184) are MOOT;

(2) Conseco's re-filed motion for appointment of itself as Lead Plaintiff and approval of its choice of Abbey Gardy, LLP and Shapiro Haber & Urmy, LLP as Co-Lead Counsel, and of Puls, Taylor & Woodson, LLP as Liaison Counsel (#7 in H-03-2240) is currently DENIED, but may be summarily reurged, if appropriate, after

the class certification motion is resolved in *Newby*.

SIGNED at Houston, Texas, this 14th day of March, 2005.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE